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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In Re:

THE RHODES COMPANIES,
aka "Rhodes Homes, *et al.*,"¹

Debtors

CASE NO. BK-S-09-14814-LBR
(Jointly Administered)

Chapter 11

**OPPOSITION TO MOTION OF
REORGANIZED DEBTORS FOR
ENFORCEMENT OF PLAN INJUNCTION
UNDER THE FIRST LIEN STEERING
COMMITTEE'S THIRD AMENDED
MODIFIED PLAN OF REORGANIZATION
PURSUANT TO CHAPTER 11 OF THE
BANKRUPTCY CODE FOR THE RHODES
COMPANIES LLC, ET AL. AGAINST CITY OF
HENDERSON**

Affects:

- ☒ All Debtors
☐ Affects the Following Debtor(s)

Hearing Date: January 8, 2014
Hearing Time: 2:30 p.m.

¹ The Debtors in these cases, along with their case numbers are: Heritage Land Company, LLC (Case No. 09-14778); The Rhodes Companies, LLC (Case No. 09-14814); Tribes Holdings, LLC (Case No. 09-14817); Apache Framing, LLC (Case No. 09-14818); Geronimo Plumbing LLC (Case No. 09-14820); Gung-Ho Concrete LLC (Case No. 09-14822); Bravo, Inc. (Case No. 09-14825); Elkhorn Partners, A Nevada Limited Partnership (Case No. 09-14828); Six Feathers Holdings, LLC (Case No. 09-14833); Elkhorn Investments, Inc. (Case No. 09-14837); Jarupa, LLC (Case No. 09-14839); Rhodes Realty, Inc. (Case No. 09-14841); C & J Holdings, Inc. (Case No. 09-14843); Rhodes Ranch General Partnership (Case No. 09-14844); Rhodes Design and Development Corporation (Case No. 09-14846); Parcel 20, LLC (Case No. 09-14848); Tuscany Acquisitions IV, LLC (Case No. 09-14849); Tuscany Acquisitions III, LLC (Case No. 09-14850); Tuscany Acquisitions II, LLC (Case No. 09-14852); Tuscany Acquisitions, LLC (Case No. 09-14853); Rhodes Ranch Golf and Country Club, LLC (Case No. 09-14854); Overflow, LP (Case No. 09-14856); Wallboard, LP (Case No. 09-14858); Jackknife, LP (Case No. 09-14860); Batcave, LP (Case No. 09-14861); Chalkline, LP (Case No. 09-14862); Glynda, LP (Case No. 09-14865); Tick, LP (Case No. 09-14866); Rhodes Arizona Properties, LLC (Case No. 09-14868); Rhodes Homes Arizona, L.L.C. (Case No. 09-14882); Tuscany Golf Country Club, LLC (Case No. 09-14884); and Pinnacle Grading, LLC (Case No. 09-14887).

1 The City of Henderson ("City"), by and through its undersigned counsel, Parsons Behle &
 2 Latimer, hereby opposes (the "Opposition") Reorganized Debtors' motion (the "Motion") for
 3 entry of an order enforcing the injunction and discharge provided for in the confirmed First Lien
 4 Steering Committee's Third Amended Modified Plan of Reorganization Pursuant to Chapter 11
 5 of the Bankruptcy Code for The Rhodes Companies LLC, et al. (the "Plan") against City. In
 6 support of the Opposition, City respectfully represents as follows:

7 BACKGROUND

8 The City of Henderson ("City") and Commerce Associates, LLC ("Commerce") entered
 9 into that C-1 Channel Phase 3 Agreement on December 14, 2004 (the "Commerce Agreement")
 10 in connection with the development of a master planned community in Henderson, Nevada,
 11 commonly known as Tuscany. *See* Commerce Agreement. A copy of the Commerce Agreement
 12 is attached to the Motion as Exhibit 1 to the Declaration of Donald Boettcher. Clause 7.13
 13 provides that the Commerce Agreement is binding upon successors and assigns. *Id.* at ¶ 7.13.
 14 Several of the Reorganized Debtors acquired portions of the Tuscany project that are subject to
 15 the Commerce Agreement. *See* Affidavit of Robert A. Murnane at ¶ 4, filed concurrently
 16 herewith ("Murnane Affidavit").

17 Prior to the Commerce Agreement, City had required and Commerce had completed
 18 Phases 1 and 2 of a water drainage facility, commonly known as the C-1 Channel, to carry storm
 19 water runoff from Tuscany and other properties. *See* Commerce Agreement at ¶ B.

20 As part of the continued development of Tuscany, City required construction of Phase 3,
 21 the final segment of the C-1 Channel. *See* Commerce Agreement at ¶ C.

22 Under the Commerce Agreement, Commerce and City agreed upon a \$934,000.00 fee in
 23 connection with Phase 3 drainage facilities, such fee to be made by Commerce, on behalf of
 24 Tuscany, to City in two installments of \$467,000.00 (the "Fee"), each due and payable in 2005.
 25 *See* Commerce Agreement at ¶ 3.3. The fee was a negotiated advance payment related to charges
 26 for work the Southern Nevada Water Authority would perform in Phase 3. *See* Commerce
 27 Agreement at ¶¶ D-H and 3.2. To date, the Fee has not been paid in whole or in part. *See*
 28 Murnane Affidavit at ¶ 5.

At the time when the Commerce Agreement was signed, the parties anticipated the development of Tuscany would soon thereafter require the Phase 3 water improvements. Murnane Affidavit at ¶ 6. The economic downturn, however, delayed the development of Tuscany and as a result the Fee was not needed at the time initially anticipated. *Id.* Now, development has continued and Reorganized Debtors are seeking from City approvals that require the Phase 3 water improvements. *Id.*

The Fee was imposed with due regard for the health, safety and management of the Las Vegas Wash, which, as provided in the Commerce Agreement, is a certain geographic channel identified on the 2002 Clark County Regional Flood Control District Master Plan Update. *See* Commerce Agreement at ¶ 3.1.

It was expressly determined under the Commerce Agreement that “the construction of Phase 3 and completion of the C-1 Channel will benefit the City, as well as the residents of Tuscany and other property owners within the City by providing for comprehensive drainage facilities in accordance with the City’s master drainage plan.” *See* Commerce Agreement at ¶ J.

City recorded the Commerce Agreement on March 22, 2006. *See* Commerce Agreement. The Commerce Agreement is recorded against certain land in Tuscany owned by some of the Reorganized Debtors, specifically Rhodes Design and Development Corporation (Case No. 09-14846); Tuscany Acquisitions IV, LLC (Case No. 09-14849); Tuscany Acquisitions III, LLC (Case No. 09-14850); Tuscany Acquisitions II, LLC (Case No. 09-14852); and Tuscany Acquisitions, LLC (Case No. 09-14853). *See* Murnane Affidavit at ¶ 4.

On March 31, 2009 and April 1, 2009, Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the Bankruptcy Code (the “Code”) in the United States Bankruptcy Court, District of Nevada (the “Petitions”), and their cases are being jointly administered under Case No. BK-S-09-14814-LBR. Despite the fact that Debtors acquired their respective interests in the encumbered Tuscany parcels prior to filing their Petitions, *see* Clark County Recorder’s printout attached to Murnane Affidavit, the Commerce Agreement was not disclosed in Debtors’ schedules.

The Plan was confirmed by Order of this Court on March 12, 2010. [Docket No. 1053]

1 The Effective Date of the Plan occurred on April 1, 2010. [Docket No. 1079] The Plan does not
2 affect the Commerce Agreement, which runs with the land.

3 On or about September 11, 2013, Reorganized Debtors submitted to City certain maps for
4 approval in conjunction with its development of Tuscany. *See* Murnane Affidavit at ¶ 7. On
5 October 4, 2013, City advised Reorganized Debtors that final approval of the maps will be held
6 until payment, or payment arrangement, of the Fee associated with the Phase 3 construction of the
7 drainage facilities has been made pursuant to the Commerce Agreement. *Id.*²

8 ARGUMENT

9 City's position that Reorganized Debtors pay the Fee associated with the construction of
10 the Phase 3 drainage facilities pursuant to the Commerce Agreement does not violate this Court's
11 federal injunction, discharge, or release approved under the Plan. The scope of protection under
12 the Plan is governed by 11 U.S.C. § 524(a)(2), which provides: "A discharge in a case under this
13 title operates as an injunction against the commencement or continuation of an action, the
14 employment of process, or an act, to collect, recover or offset any such debt as a personal liability
15 of the debtor. . . ." City's actions do not violate Section 524(a)(2), and therefore do not violate
16 the Plan.

17 City's actions do not violate Section 524(a)(2) for at least two reasons. First, an act *in rem*
18 does not violate Section 524(a)(2). *See In re Rountree*, 448 B.R. 389, 401 (Bankr. E.D. Va. 2011)
19 (citing *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991)). Second, an act that does not violate
20 the test applicable to a determination of a violation of the automatic stay under Section 362 does
21 not violate Section 524(a)(2). *See Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th
22 Cir. 1996).

23 **I. An Act *In Rem* Does Not Violate Section 524(a)(2), and Therefore Does Not Violate** 24 **the Plan.**

25 The scope of the discharge injunction under Section 524(a)(2) prohibits a creditor from
26 enforcing a discharged claim against a debtor *in personam*, but the discharge injunction does not

27
28 ² By asserting its rights under the Commerce Agreement, City is not contending that the Commerce Agreement is the only basis for the payments relating to the costs of the Phase 3 improvements.

1 prohibit the creditor from enforcing an *in rem* claim against the debtor's property. *See* 11 U.S.C.
 2 § 524(a)(2) ("A discharge in a case under this title operates as an injunction against the
 3 commencement or continuation of an action, the employment of process, or an act, to collect,
 4 recover or offset any such debt as a *personal liability* of the debtor...." (emphasis added)). The
 5 Supreme Court highlighted this aspect of the discharge injunction in *Johnson v. Home State Bank*,
 6 501 U.S. 78 (1991): "[A] bankruptcy discharge extinguishes only one mode of enforcing a claim
 7 – namely, an action against the debtor *in personam* – while leaving intact another – namely, an
 8 action against the debtor *in rem*." *Id.* at 83–84.

9 City's position that the Fee associated with the Commerce Agreement be paid prior to
 10 City's approval of maps for parcels against which the Commerce Agreement is recorded is an act
 11 *in rem*. City's act is plainly directed toward the parcel against which the Commerce Agreement
 12 is recorded – not *personally* against Reorganized Debtors. Therefore, City's actions do not
 13 violate Section 524(a)(2) and, accordingly, do not violate the Plan.

14 **A. Even if City is not enforcing a claim *in rem*, the Commerce Agreement "rode**
 15 **through" the bankruptcy.**

16 Even if City is not enforcing a claim *in rem*, the Commerce Agreement is an executory
 17 contract that was neither assumed nor rejected in Debtors' bankruptcy. Accordingly, the
 18 Commerce Agreement "rode through" the bankruptcy, meaning "the contract is unaffected by the
 19 bankruptcy and the interests of both parties to the contract are preserved." *See In re JZ, LLC*, 357
 20 B.R. 816, 821 (Bankr. D. Idaho 2006); *In re Hernandez*, 287 B.R. 795, 801 (Bankr. D. Ariz.
 21 2002).

22 The Commerce Agreement is an executory contract. "An executory contract is one on
 23 which performance remains due to some extent on both sides. More precisely, a contract is
 24 executory if the obligations of both parties are so unperformed that the failure of either party to
 25 complete performance would constitute a material breach and thus excuse the performance of the
 26 other." *In re Robert L. Helms Construction & Development Co., Inc.*, 139 F.3d 702, 704 (9th Cir.
 27 1998) (quotation marks and citations omitted). At the time of Debtors' Petitions, the Fee had not
 28 been paid in whole or in part given that, to date, the Fee has not been paid in whole or in part. *See*

1 Murnane Affidavit at ¶ 5. The failure to pay the Fee constitutes material breach under the
 2 Commerce Agreement. *See* Commerce Agreement at ¶¶ 5.1 and 5.3.

3 Section 1123(b)(2) provides that “a plan may—subject to section 365 of this title, provide
 4 for the assumption, rejection, or assignment of any executory contract or unexpired lease of the
 5 debtor not previously rejected under such section.” The Ninth Circuit explained that in Chapter
 6 XI proceedings under the Bankruptcy Act, an executory contract continues in effect if the debtor
 7 in possession fails to affirmatively assume or reject it. *See Smith v. Hill*, 317 F.2d 539, 543 n. 6
 8 (9th Cir.1963). This principle is known as the “ride through” doctrine. *See, e.g., In re JZ, LLC*,
 9 357 B.R. 816, 821 (Bankr. D. Idaho 2006). “Though decided under the Act, *Hill* has been cited
 10 by several Code-era bankruptcy courts in cases discussing the “ride through” doctrine.” *Id.* at 821
 11 (citing *In re Hernandez*, 287 B.R. 795, 800 (Bankr. D. Ariz. 2002); *In re Cajun Elec. Power Co-*
 12 *op., Inc.*, 230 B.R. 715, 734 (Bankr.M.D.La.1999); *In re Parkwood Realty Corp.*, 157 B.R. 687,
 13 690 (Bankr.W.D.Wash.1993); *Polysat, Inc. v. Union Tank Car Co.*, 152 B.R. 886, 890
 14 (Bankr.E.D.Pa.1993).

15 The “ride through” doctrine has also been recognized by the U.S. Supreme Court and a
 16 leading bankruptcy treatise. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 546 n. 13 (1984)
 17 (noting in dicta that when a “contract is neither accepted nor rejected, it will ‘ride through’ the
 18 bankruptcy proceeding and be binding on the debtor even after a discharge is granted.”); 3 *Collier*
 19 *on Bankruptcy* ¶ 365.04[3] at 365–33 (15th ed. rev.2006) (“If the trustee or debtor in possession
 20 fails either to assume or reject a contract by separate order in the plan, it appears that the contract
 21 would continue in existence.”).

22 Here, despite the fact that Debtors acquired their interest in the encumbered Tuscany
 23 parcels prior to filing their Petitions, the Commerce Agreement – an executory contract – was not
 24 disclosed in Debtors’ schedules. Debtors failed to affirmatively assume or reject the Commerce
 25 Agreement. Accordingly, the Commerce Agreement “rode through” Debtors’ bankruptcy. Thus,
 26 even if City is found to be enforcing a claim under the Commerce Agreement *in rem*, the
 27 Commerce Agreement is unaffected by the bankruptcy and the interests of both parties to the
 28

1 contract are preserved. *See, e.g., In re JZ, LLC*, 357 B.R. 816, 821 (Bankr. D. Idaho 2006); *In re*
 2 *Hernandez*, 287 B.R. 795, 801 (Bankr. D. Ariz. 2002).

3 **II. An Act that Does Not Violate the Test Applicable to a Determination of a Violation of**
 4 **the Automatic Stay Under Section 362 Does Not Violate Section 524(a)(2), and**
 5 **Therefore Does Not Violate the Plan.**

6 At least one Bankruptcy court has noted that “Bankruptcy courts generally follow the
 7 Eleventh Circuit’s test in deciding whether the injunction of § 524(a)(2) has been violated, and, if
 8 so, willfully.” *In re Phillips*, 368 B.R. 733, 742 (Bankr. N.D. Ind. 2007). “The test applicable to
 9 the determination of a willful violation of the automatic stay under § 362 is *equally applicable* to
 10 the determination of willful violation of the post-discharge injunction under § 524.” *In re*
 11 *Pincombe*, 256 B.R. 774, 783 (Bankr. N.D. Ill. 2000) (citing *Hardy v. United States (In re*
 12 *Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)) (emphasis added). Accordingly, if City’s actions
 13 do not violate Section 362, they in turn do not violate Section 524(a)(2).

14 Under Section 362, certain activities are exempted from the automatic stay when a
 15 bankruptcy petition is filed. Section 362(b)(4) provides that the filing of a petition does not
 16 operate as a stay of “the commencement or continuation of an action or proceeding by a
 17 governmental unit to enforce such governmental unit’s police or regulatory power.” The term
 18 “police or regulatory power” is not defined in the Bankruptcy Code.

19 The Ninth Circuit applies two alternative tests to determine whether an action is in
 20 exercise of a governmental unit’s police and regulatory power. *California ex rel. Brown v.*
 21 *Villalobos*, 453 B.R. 404, 409 (D. Nev. 2011) (citing *City & County of San Francisco v. PG & E*
 22 *Corp.*, 433 F.3d 1115, 1123–24 (9th Cir.2006). The Ninth Circuit tests have been recognized by
 23 this Court. *See id.*

24 The [two alternative] tests are the “pecuniary purpose” test and the
 25 “public policy” test. *Id.* at 1124. “Satisfaction of either test will
 26 suffice to exempt the action from the reach of the automatic stay.”
 27 *Id.* Under the pecuniary purpose test, “the court determines whether
 28 the government action relates primarily to the protection of the
 government’s pecuniary interest in the debtor’s property or to
 matters of safety and welfare.” *Id.* at 1124–25. Under the public
 policy test, “the court determines whether the government seeks to

1 'effectuate public policy' or to adjudicate 'private rights.'" *Id.* at
2 1125."

3 *California ex rel. Brown v. Villalobos*, 453 B.R. 404, 409 (D. Nev. 2011) (citing *City & County of*
4 *San Francisco v. PG & E Corp.*, 433 F.3d 1115 (9th Cir.2006).

5 Under the pecuniary purpose test, "[i]f the action primarily seeks to protect the
6 government's pecuniary interest, the automatic stay applies. If the suit primarily seeks to protect
7 the public safety and welfare, the automatic stay does not apply." *Id.* at 413 (citing *City & County*
8 *of San Francisco v. PG & E Corp.*, 433 F.3d 1115 (9th Cir. 2006). This Court has explained that
9 "[a]n example of a suit that would fail to satisfy the pecuniary purpose test (and also the public
10 policy test) would be one in which the government sues a party to a governmental contract for
11 contractual damages." *Id.* at 413 (citing *In re Coporacion de Servicios Medicos Hospitalarios de*
12 *Fajardo*, 805 F.2d 440, 445 (1st Cir. 1986).

13 City's actions pass the pecuniary purpose test. First, City has not sued Reorganized
14 Debtors. Second, City has not sought contractual damages from Reorganized Debtors. Third,
15 City's actions "primarily seek to protect the public safety and welfare." *Id.* at 413. A fee that
16 "benefits . . . residents of Tuscany and other property owners within the City by providing for
17 comprehensive drainage facilities in accordance with the City's master drainage plan" is clearly
18 for the public safety and welfare. *See* Commerce Agreement at ¶ J. Indeed, the Fee was agreed
19 upon with "due regard. . . for the overall health, safety and management of the Las Vegas Wash."
20 *See* Commerce Agreement at ¶ 3.1).

21 Under the public purpose test, "the court determines whether the government seeks to
22 'effectuate public policy' or to adjudicate 'private rights.' If the primary purpose of the suit is to
23 effectuate public policy, then the exception to the automatic stay applies. However, [a] suit does
24 not satisfy the 'public purpose' test if it is brought primarily to advantage discrete and identifiable
25 individuals or entities rather than some broader segment of the public." *City & Cnty. of San*
26 *Francisco v. PG & E Corp.*, 433 F.3d 1115, 1125 (9th Cir. 2006) (internal citations omitted).

27 City's actions pass the public purpose test. As noted above, the Fee helps provide for
28 "comprehensive drainage facilities in accordance with the City's master drainage plan." *See*

Commerce Agreement at ¶ J. A fee that provides comprehensive drainage facilities is clearly for a public purpose. Comprehensive drainage facilities in turn “benefit the City, as well as the residents of Tuscany and other property owners within the City.” *Id.* A fee for drainage facilities that benefit the City, benefit the residents of Tuscany, and benefit other property owners is clearly for a public purpose. Furthermore, storm water runoff is a public harm. Thus, the fee also addresses public harm. Accordingly, government action that funds construction and completion of comprehensive drainage facilities “is not analogous to cases in which the government is, essentially, adjudicating private rights rather than addressing public harms.” *California ex rel. Brown v. Villalobos*, 453 B.R. 404, 416 (D. Nev. 2011).

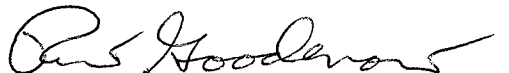
City’s position that Reorganized Debtors pay the Fee associated with the construction of the Phase 3 drainage facilities pursuant to the Commerce Agreement is an exercise of its police power within the meaning of 11 U.S.C. § 362(b)(4), and is therefore exempt from the automatic stay. Accordingly, the City’s actions do not violate Section 524(a)(2) or, in turn, the Plan.

CONCLUSION

WHEREFORE, City respectfully requests that the Court deny Reorganized Debtors’ Motion.

DATED this 16th day of December, 2013

PARSONS BEHLE & LATIMER

By: 
 Rew R. Goodenow, Bar No. 3722
 Attorney for City of Henderson

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 2013, I caused to be filed and served through the Bankruptcy Court's ECF system, a true and correct copy of the foregoing **OPPOSITION TO MOTION OF REORGANIZED DEBTORS FOR ENFORCEMENT OF PLAN INJUNCTION UNDER THE FIRST LIEN STEERING COMMITTEE'S THIRD AMENDED MODIFIED PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE FOR THE RHODES COMPANIES LLC, ET AL. AGAINST CITY OF HENDERSON**, to:

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1 and sent the same via US Mail, postage prepaid to the following:

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7 AMERICA, LLC
8 BY & THRU ITS REGISTERED AGENT:
9 CSC SERVICES OF NEVADA, INC.
10 2215-B RENAISSANCE DRIVE
11 LAS VEGAS, NV 89119

12 F/KA MERRILL LYNCH B OF A ML
13 ASSET HOLDING
14 BY AND THROUGH ITS REGISTERED
15 AGENT
16 CORPORATION TRUST COMPANY OF
17 NEVADA
18 311 SOUTH DIVISION STREET
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8	BANK, N.A	PHILIP S. GERSON
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11	LLP	on behalf of Creditor CLARK COUNTY
12	ONE BRYANT PARK	
13	NEW YORK, NY 10036	GIBSON DUNN & CRUTCHER LLP
14	on behalf of Creditor STEERING	ATTN: ANY OFFICER, PARTNER OR
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22	on behalf of Creditor STEERING	
23	COMMITTEE OF SENIOR SECURED	SHARELLE SNOW HENLE
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21 CONSULTANTS, INC.

22 MASTEC NORTH AMERICA INC
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26 MUTUAL OF OMAHA BANK
27 BY & THRU ITS REGISTERED AGENT:
28 CSC SERVICES OF NEVADA, INC.
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NEVADA STATE BANK
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SECURITY TITLE OF NEVADA, LLC
BY AND THROUGH ITS REGISTERED
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12 STEWART TITLE COMPANY
13 CORPORATION TRUST COMPANY OF
14 NEVADA
15 BY AND THROUGH ITS REGISTERED
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17 311 S. DIVISION STREET
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24 SPRINGS HOMEOWNERS
25 ASSOCIATION, INC.
26 C/O FEINBERG GRANT MAYFIELD
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